*THE HONOURABLE SRI JUSTICE V.V.S.RAO

+WRIT PETITION NO.11391 OF 2005

%15-07-2005

GVPREL-MEE (J.V), Represented by its General Power of Attorney Holder Sri G. Siva Sankar Reddy, House No. 101, Siva Sai Sannidhi, Plot No. 32, Opp.Shiridi Saibaba Temple, Hindinagar, Panjagutta,

Hyderabad- 500 034.

..PETITIONER

Vs.

$ 1 The Government of Andhra Pradesh, Represented by the

Principal Secretary, Irrigation and Command Area Development

Department, Scretariat, Hyderabad.

2 The Engineer-in- Chief (Irrigation), Irrigation & Command Area

Development Department, Errum Manzil, Hyderabad.

..RESPONDENTS

!C O U N S E L FOR PETITIONER: MR.E.MANOHAR, Senior Advocate for MR.P.KAMLAKAR

^ COUNSEL FOR RESPONDENTS 1 &2: THE ADOVCATE GENERAL/GP FOR IRRIGATION & COMMAND AREA DEVELOPMENT

<GIST

>HEAD NOTE:

? CASES REFERRED:

1. AIR 1986 Guj 185
2. (1987) 1 Comp LJ 1 (Guj)
3. AIR 1999 SC 393
4. 2003(1) ALD 336 = 2003(2) ALT 288
5. 2004(1) ALD 783
6. 359 US 535 = 3 L Ed 2d 1012 (1959)
7. 2002(5) ALD 398
8. AIR 1996 SC 11
9. (1995) 1 SCC 478

IN THE HIGH COURT OF JUDICATURE, ANDHRA PRADESH
AT HYDERABAD

(Special Original Jurisdiction)

FRIDAY, THE FIFTEENTH DAY OF JULY
TWO THOUSAND AND FIVE

PRESENT

THE HON'BLE MR JUSTICE V.V.S.RAO

-

WRIT PETITION No.11391 of 2005

Between:

GVPREL-MEE (J.V), Represented by its General Power of Attorney Holder

Sri G. Siva Sankar Reddy, House No. 101, Siva Sai Sannidhi, Plot No. 32, Opp.Shiridi Saibaba Temple, Hindinagar, Panjagutta, Hyderabad- 500 034.

..... PETITIONER

AND

1 The Government of Andhra Pradesh, Represented by the

Principal Secretary, Irrigation and Command Area Development

Department, Scretariat, Hyderabad.

2 The Engineer-in- Chief (Irrigation), Irrigation & Command Area

Development Department, Errum Manzil, Hyderabad.

.....RESPONDENTS

Petition under Article 226 of the Constitution of India praying that in the circumstances stated in the Affidavit filed herein the High Court may be pleased to issue a Writ, in the nature of a Writ of Mandamus or any other appropriate Writ, direction or order declaring the inaction of the respondents in not issuing the LoAs and not entering into agreements with the petitioner in respect of packages 90,91 and 98 under Category 2 pursuant to Tender Number e-procurement (GNSSC/CDP) 3/2004-2005, dated 08-01-2005, for packages 90 and 91, and Tender Number 17/2004-2005 dated 10/01/2005, for package 98, as illegal and void and direct the respondents to issue LoAs and enter into agreements with the petitioner.

Counsel for the Petitioner: MR.E.MANOHAR, Senior Advocate for MR.P.KAMLAKAR

Counsel for the Respondents: THE ADOVCATE GENERAL/GP FOR IRRIGATION & COMMAND AREA DEVELOPMENT

The Court made the following:

THE HON'BLE SRI JUSTICE V.V.S.RAO

WRIT PETITION NO.11391 OF 2005

ORDER:

INTRODUCTION

The Government of Andhra Pradesh mooted water resource development projects for medium size projects in the State with a view to complete all the important projects in progress and also proposed to take up new projects. All these are to be completed within a period of five years to augment irrigation potential. The Government proposed to divide works into suitably large convenient packages so as to invite tenders for Engineering, Procurement and Construction (EPC) on turn key system including investigation, design, preparation of construction of projects, cost estimates, construction, maintenance and operation for one irrigation system. The Government decided to take up the tender process in two stages. In the first stage it proposed to empanel a specified number of special class civil contractors by inviting offers for pre-qualification to tender for the projects. In the second stage it was proposed to again invite tenders inviting offers from empanelled concerns/firms/companies to take up water resources projects on EPC turn key basis. These financial bids are to be evaluated mainly at the stage of a high powered committee and then by the Government. The dispute in this Writ Petition is in relation to rejection of the financial bid/tender of the petitioner which was initially empanelled after pre-qualifying it. The petitioner prays for a Mandamus directing the respondents to issue Letters of Acceptance (LoAs) for packages 90, 91 and 98 under category –2 pursuant to tender notice dt.8.1.2005.

BACKGROUND FACTS & PLEADINGS

The fact of the matter is not much in dispute. M/s.GVPR Engineers Limited (GVPREL) is a company registered under the Companies Act, 1956. M/s.Megha Engineering Enterprises (MEE) is a partnership firm. Both of them entered into a joint venture agreement on 31.8.2004 in the name and style of GVPREL – MEE (JV). M/s.GVPREL is lead partner in JV. This was done pursuant to a tender notice No.2, dt.13.8.2004 inviting offers for pre-qualification for water resource projects. The deponent of the writ affidavit was authorised to represent the joint venture and sign all pre-qualification documents. After evaluating the pre-qualification documents, the Government empanelled 46 concerns/companies vide their orders in G.O.Ms.No.727, Irrigation & CAD (PPMU), dt.24.9.2004. Subsequently, by another order being G.O.Rt.No.958, dt.28.12.2004 the Government empanelled 19 more companies/concerns. The petitioner JV was empanelled vide G.O.Rt.No.727, dt.24.9.2004 for participation in the procurement for medium size packages of projects under EPC system.

The petitioner was also allotted user-id as it was e-procurement. The Government of Andhra Pradesh issued tender notice
No.e procurement-3/2004-2005 for different packages. The petitioner JV submitted its tenders for packages 90, 91 and 98 through its authorised G.P.A holder –

G.S.S.Reddy along with bank guarantees on 15.2.2005. The tenders for packages 90 and 91 were opened by the competent authority on 19.2.2005. The petitioner JV was found to be lowest tenderer – L1. The difference in the quoted value between L1 and L2 was Rs.8.48 crores for package 90, and Rs.7.20 crores for package 91.

MEE, another JV partner of petitioner sent a letter on 21.2.2005 to the respondents withdrawing from joint venture and requesting not to consider the bids submitted by petitioner JV. However, MEE did not send a copy of the letter to the petitioner GVPREL or its GPA holder. Be that as it is, on 7.4.2005 bids for package No.98 were opened. Petitioner JV was found to be L1 with a difference between L1 and L2 at Rs.2.10 crores. It is the case of the petitioner that the bids submitted by it for packages 90, 91 and 98 were accepted by second respondent and were sent to tender evaluation committee.

Sri G.S.S.Reddy having come to know through newspaper reports that MEE addressed a letter to the respondents, addressed a letter to the respondents on 2.3.2005 to ignore the letter of MEE. He also sent a letter on 15.4.2005 to the respondents to issue LoAs, in vain. According to the petitioner, if the tenders submitted by petitioner JV are accepted, there would be a saving of Rs.41.51 crores to the State. The tenders submitted by the petitioner JV were not accepted, and on 28.4.2005 Ex-Officio Advisor to the Government addressed Memo to Managing Director of GVPREL and Chief Executive Officer of MEE requesting them to appear before the evaluation committee on 4.5.2005 to establish a solidarity as joint venture of petitioner JV. It was also informed that in the opinion of the Government, in view of the letters of MEE dt.21.2.2005 and 14.3.2005, withdrawing from joint venture, the petitioner JV is no more a joint venture. The meeting of both JV partners with tender evaluation committee was held on 5.5.2005. At that meeting the petitioner gave a letter dt.5.5.2005 to the Advisor inter alia informing that even if MEE is not willing to cooperate, the other constituent has got required experience, equipment, financial strength and personnel to be accepted as a successful bidder. At that stage, G.S.S.Reddy again having come to know through newspapers that the Government is likely to award the contract to L2 and L3 tenders, filed present Writ Petition.

This Court while admitting the Writ Petition on 17.5.2005 by order of even date in W.P.M.P.Nos.14579 and 14580 of 2005 directed the respondents not to award the works of packages 90, 91 and 98 to any other tenderer and not to forfeit the E.M.D. given by the petitioner. This Court also directed the respondents to consider and dispose of representation dt.5.5.2005 after giving opportunity to the petitioner. The Government immediately moved this Court on 24.5.2005 for vacating the interim orders. However, on 24.5.2005 this Court declined to vacate the interim orders and thereafter the Writ Petition was set down for hearing before this Court.

The second respondent filed counter affidavit. The factual matrix is not disputed. What is disputed is that after withdrawal of MEE, petitioner JV became non-existent and rendered itself disqualified. The relevant averments in the counter are as under.

> With regard to para 11 of the affidavit, it is submitted that it is not known to the respondents whether M/s. MEE, partner of joint venture has

withdrawn from JV either at the instance of failed tenders or voluntarily. It appears from the letter of MEE that they are not interested in continuing in the JV for various reasons and have withdrawn from the Joint Venture. Irrespective of the reasons for withdrawing from the JV by M/s.MEE, the JV became non-existent due to withdrawal of one of the partner. The dispute between the JV partners resulted in absolving/winding up Joint Venture thereby disqualifying the JV firm for considering for award of work.

With regard to para 12 of the affidavit, it is submitted that it is not the look out of the Government/Department whether M/s.MEE have communicated their withdrawal to the firm M/s.GVPREL-MEE. But it is a fact that M/s.MEE has withdrawn from the JV which is explained in later paras. The firm M/s.MEE has referred clause 12 of the JV agreement where it is stipulated that any transaction without coming to a agreement for individual work shall not hold any validity and requested not to consider the bids, as they are not interested in continuing as the partner of JV. It is respectfully submitted that no arbitration clause is envisaged in the JV agreement for resolution of dispute/s as stated by the petitioner.

With regard to para 20 of the affidavit, it is submitted that the letter written by the partner to the Government is got confirmed by giving personal hearing to both the parties and the Government cannot be made responsible for their personal differences. It is respectfully submitted that due to the differences in the Joint Venture, the public interest at large should not suffer by stopping the works which would affect the large number of farmers and any delay in completing the works would adversely affect the ayacutdars under the project.

As noticed above, while passing interim orders, this Court directed the respondents to consider the representation dt.5.5.2005 made by the petitioner after giving opportunity to the petitioner. In pursuance thereof, the high power committee gave opportunity to authorised signatory, considered presentation given by him and came to the conclusion that petitioner JV is not in existence in view of withdrawal of JV partner MEE. The decision was communicated to the petitioner by letter No.13009/Reforms/2005-5, dt.4.7.2005. This is not denied.

RIVAL SUBMISSIONS

Sri E.Manohar, learned Senior Counsel for the petitioner submits that the rejection of tender of petitioner JV, though admittedly is the lowest for the packages 90, 91 and 98, is illegal. It is his submission that even after withdrawal of MEE from JV, by reason of the General Power of Attorney executed in favour of Sri G.S.S.Reddy as authorised signatory, the entity of JV as such does not become non-existent and respondents have committed illegality in coming to the conclusion that the JV is non-existent. Taking this Court through the general instructions to the applicants at the stage of notice inviting offers for pre-qualification to tender, instructions to bidders contained in the tender schedule, the JV agreement between GVPREL and MEE and other connected documents, the learned counsel would submit that even if MEE has withdrawn, the same is illegal as there cannot be any unilateral withdrawal. In

such an event, according to the learned counsel, the Government ought to have ignored the letter addressed by MEE and ought to have accepted the lowest tender submitted by petitioner JV. He has placed strong reliance on two Division Bench judgments of Gujarat High Court in **Asia Foundations & Constructions Ltd. v. State,** and **Chahal Engg. & Construction Co(P) Ltd. v. State of Gujarat.**

Learned Advocate General appearing for the respondents submits that as per the instructions to the applicants at the stage of pre-qualification though the petitioner JV satisfied the essential qualifications; at the time of accepting the tenders, the petitioner JV became non-existent by reason of withdrawal of MEE from JV and therefore there is no illegality in the Government rejecting offer of the petitioner. It is also contended that if MEE withdraws from JV, GVPREL on its own would not be entitled even to offer for pre-qualification to tender and therefore there is no unreasonableness in the respondents coming to the conclusion that JV is non-existent. Secondly, it is urged that as per the instructions to bidders contained in tender schedule exclusive right is reserved to the employer to reject the request of JV for change of MoU or JV partner and therefore in rejecting the request of the petitioner to accept the tender even after withdrawal of MEE is justified. Though the learned Advocate General does not dispute that the petitioner became L1 in respect of packages 90, 91 and 98, he would urge that in field of contracts lowest price offered itself is not a criteria and larger public interest must be sub-served even if the other tenders are considered.

POINT FOR CONSIDERATION

The only point that would arise for consideration is whether the Government was justified in not issuing LoA to the petitioner in respect of packages 90, 91 and 98 on the ground that petitioner JV which offered for pre-qualification to tender became non-existent at the second stage of consideration and acceptance of bids.

It is now well-settled that subject to inherent limitations, the judicial review, in a given case is available in relation to exercise of contractual powers by the Government. If it is shown that the public authority committed gross illegalities or exercise power in abusive and arbitrary manner, a Writ Petition would be maintainable even when the contractual powers of the State are impeached. In scrutinizing the State action in awarding contract, the Court is required to keep in mind competing right between the individual and public. If public interest can be sub-served by impugned State action, it has to be preferred to individual right ignoring even financial aspect of the matter. As held by the Supreme Court in **Raunaq International Ltd. v. I.V.R.Constructions** financial savings to the State would ultimately sub-serve public interest. Over a period of almost four decades, in India clear principles have been evolved by the Courts in the matter of judicial review of contractual powers of the State.

In **Goldstone Exports Limited v. Government of A.P.** and **Godavari Polymers Pvt. Ltd. v. Agricultural Products Commissioner & Principal Secretary**, this Court, after referring to most of the case law of the Supreme Court, culled out the following principles.

i. There is no mandatory principle of law, convention, custom, or administrative precedent requiring the Government or public authority to call for tenders while undertaking various governmental activities.

ii. The Government is free to enter into contract with citizens either for the sale of immovable property like land/buildings or movable property, sell industrial units or its shares and stocks in public limited companies or in the companies of Government participation.

iii. The Government's exercise of contractual powers must adhere to principles of equality before law and equal protection of laws keeping in view Articles 14, 15(1), 298 and 299.

iv. All the eligible, qualified and suitable persons are entitled to claim right to be treated equally in the matter of awarding contract by the Government and public authorities.

v. No citizen however can have an enforceable right to compel the State to enter into contract with him or her. The Court of judicial review cannot either declare or enforce such a nebulous right.

vi. The Court of Judicial review cannot interfere with the Government's absolute right to enter into contract with citizens unless such action is contrary to public interest, arbitrary and/or discriminatory.

vii. When the award of contract by a public authority or State is challenged before the Court, ordinarily the decision cannot be interfered with, unless the Court is satisfied that there is some element of public interest involved in entertaining such writ petition. By award of the contract, if the best price or best service is procured the same generally would subserve public interest and mere price difference between two tenderers may or may not be decisive in deciding whether any public interest is involved.

viii. State owned/public owned property cannot be dealt with at absolute discretion of the executive. Public interest is a paramount consideration and one of the methods of securing public interest when it is considered necessary to dispose of the property is to sell property by public auction or by inviting tenders. This rule of disposing of property by public auction or by inviting tenders can only be relaxed in a situation intended to achieve goals set out in Part-IV of the Constitution.

ix. When the property is disposed of by public auction or by public tender the standards and guidelines set out in the invitation to tender or tender document must be scrupulously adhered to and the method private negotiations is not ordinarily permissible unless there is sufficient indication in notice inviting tenders for such negotiations.

x. Tender conditions are in the nature of administrative guidelines or instructions. Thus, the principle in **Vitarelli v. Seaton** that an executive agency must be rigorously held to the standards by which it professes its actions to be judged and if the tender conditions require strict compliance there can be no relaxation of tender conditions. This, however, is not the case if the tender document or tender conditions require only substantial compliance with the tender conditions. This point is further discussed infra.

xi. When the offers/proposals by bidding parties are evaluated by committee of experts with special knowledge, the decision plays an important role and price offered is only one of the criteria. The past record of the tenderers, quality of goods or services which are offered, its market reputation etc., play important role in deciding to whom the contract should be awarded.

xii. The decision of public authority or the State especially when it is founded on the decision of experts committee cannot be subjected to appeal before the Court and ordinarily the decision of experts committee should receive approval of the Court unless it is grossly arbitrary and discriminatory.

xiii. So as to get the best price, best goods or best services, even if the Government enters into negotiations with all the eligible tenderers, there should be equality in the process, in that all the tenderers should be given an opportunity to participate in the negotiations. If the process is fair and not arbitrary, the absence of power to negotiate would not vitiate the decision-making by the public authority.

xiv. Each and every lapse, breach or contravention, unless contrary to public interest, would not give rise to a ground for interference in a petition for judicial review. Administrative Law recognizes that fair play in the joints is a necessary concomitant for an administrative body functioning in an administrative sphere while making decisions in the tender process.

It is also now well settled that when the tender conditions either at the stage of pre-qualification or at the stage of financial bids are to be strictly construed unless by express provision tender conditions require only substantial compliance. The essential qualifications prescribed at the stage of pre-qualification must be strictly applied as otherwise the employer would be left with unguided and arbitrary powers to relax the conditions in respect of those persons who are favoured and relaxation would be denied against some others.

As agreed by the learned Senior Counsel for the petitioner and the learned Advocate General for the State, the impugned State action is to be examined only on the ground of legality. As laid down by Lord Diplock in **Council of Civil Services Union v. Minister for Civil Services** illegality, irrationality and impropriety are three grounds on which ordinarily a petition for judicial review would lie. These grounds of judicial review are equally applicable in the context of Indian administrative law by reason of the decision of the Supreme Court in **Tata Cellular v. Union of India**. Dealing with the ground of illegality and its scope in **Sri Bhavanarishi Cooperative House Building Society v. Joint Collector**, this Court observed as under.

> An administrative decision is illegal if "(i) it contravenes or exceeds the terms of the power which authorizes the making of a decision; or (ii) it pursues the objective other than that for which a power to make the decision was conferred. In *Tata Cellular*, the Supreme Court observed that illegality

> means the decision maker must understand correctly the law that regulates the decision making power and must give effect to it. It was also observed that a Court of judicial review must confine itself to the question of legality by examining whether a decision making authority exceeded its power, committed an error of law, committed breach of rules of natural justice and reached a decision which no reasonable Tribunal would have reached.

When the respondents came to the conclusion that by reason of withdrawal of MEE, the petitioner JV became non-existent and therefore failed to satisfy the qualification criteria prescribed in the tender document, did they understand and apply the law correctly? Whether the joint venture M/s.GVPREL-MEE (JV) still remain in existence even after withdrawal of MEE? And, What is the position of remaining lead partner GVPREL after withdrawal of MEE? These are the questions which need to be addressed for resolving the controversy.

What is joint venture and what is its status in law?

No law on the Statute book of India or the State define a joint venture, though under Section 8 of the Partnership Act, 1932, a person may become a partner with another person in a particular adventures or undertakings. In case of such "particular partnership" it has its existence only till the purpose for which said partnership or adventure or undertaking came into being. It gets dissolved the moment the purpose for which the partners joined is accomplished and liabilities of persons joining in a particular partnership for the purpose of particular adventure would only lost till such undertaking completes the purpose for which it is formed. Such particular partnerships are restricted to a single project in which the members of the group act jointly both at the stage of tendering and at the stage of awarding. Being unincorporated associations, common law did not recognise the relationship of co-adventures, but with the passage of time, the judicial decisions recognised what is known as "joint venture" of 'two or more persons/undertakings to combine their property or labour in conduct of particular line of trade or a general business for joint profits.

In **Asia Foundations & Constructions Ltd. v. State** (supra) a Division Bench of Gujarat High Court considered legal standing of joint venture, and rights and liabilities of joint partners. The Acting Chief Justice B.K.Mehta speaking for the Bench discussed this aspect of the matter in the following manner.

> The common law did not recognise the relationship of coadventures, but with the passage of time, the judicial decisions recognised what is known as 'joint adventure' of two or more persons undertaking to combine their property or labour in conduct of particular line of trade or a general business for joint profits. The Courts do not treat a joint adventure as identical with a partnership though it is so similar in nature, and in the contractual relationship created by such adventurerers that the rights as between them are governed practically by the same rules that govern the partnership. This relationship has been defined to be a special combination of persons undertaking jointly some specific adventure for profit without any actual partnership. It is also described as a commercial or a maritime enterprise undertaking by several persons jointly; a limited partnership not limited in the statutory sense as to

> the liabilities of partners but as to its scope and duration. Generally speaking the distinction between a joint adventure and a partnership is that former relates to a single transaction 'though it may comprehend a business to be to be continued over several years' while the later relates to a joint business of a particular kind (see : 48 American Law Reports at p. 1055 under the caption "what amounts to a joint adventure" at pages 1056-57 and 1060). It is generally agreed that in order to constitute a joint venture, there must be community of interest and right to joint control. It is recognised on authority that each of the parties must have an equal voice in the matter of its performance and control over the agencies used therein, though one authority may entrust the performance to another. There is also an authority to the effect that a joint venture may exist although the parties have unequal control of operations. The rights, duties and liabilities of joint ventures are similar or analogous to those which govern the corresponding rights, duties and liabilities of the partners. As in the case of partners, joint ventures may be jointly and severally liable to third parties for the debts of the venture (see: American Jurisprudence, Second Edition, Vol.46, para 12 at pages 33-34 and para 57 to p.76). Joint Venture groups are internationally recognised in form of cooperation in the joint fulfilment of the construction contract obligations. Joint venture groups in the construction industry come about through agreements for combination of legally independent contractors for the joint rendering of construction services limited in both time and content. Typically they are restricted to a single project in which case the members of the group act jointly at both the tendering and award stages. Joint venture groups are generally unincorporated associations. The legal systems in general have not kept pace with the growing economic means of joint venture groups and there is no special legal form for this type of cooperation which has come to stay in construction industry.

Dealing with rights and liabilities of the members of joint venture, it is observed as under.

> The services to be rendered by the group are to be allocated amongst the members of the same by internal agreement, and consequently the rights and duties of the members inter se are also regulated by the group agreement. These internal agreements are not effective vis-à-vis the third parties, and they operate amongst the members inter se. **Thus, all the members are jointly and severally liable for performance of the construction work jointly undertaken irrespective of internal division of the work. If one member of the joint venture group does not fulfil his commitments, the others are under joint and several obligation to carry out such obligations vis-à-vis the customer. Such a situation may arise when a member of a joint venture group drops out prematurely because of the liquidation or insolvency. When a contract is concluded with a joint venture group all members are made jointly and severally liable even if only one is capable of rendering the service in question.** The joint and several liabilities of the members of a joint venture group may cover the marginal areas of the contract performance such as late performance, faults, deficiency of goods and services etc.

(emphasis supplied)

In **Chahal Engg. & Construction Co(P) Ltd. v. State of Gujarat** (supra) a Division Bench of Gujarat High Court was dealing with a case of joint venture where at the

stage of consideration of pre-qualification to tender, one of the members of eight participants of joint venture consortium, withdrew from the group. The Gujarat High Court considered JV agreement and subsequent postils to it, came to the conclusion that even if one of the joint venture partners withdrew from the joint venture, still joint venture continued to function. The relevant passages from the judgment delivered by Justice B.K.Mehta are as follows.

> The case, therefore, is not of termination of the joint venture agreement or it ceasing to be in effect on the expiry of 12 months, but is virtually a case of withdrawal by one of the co-venturers. **The question which, therefore, arises is whether a co-venturer is entitled to withdraw before the purpose of the venture is accomplished or has failed; and if he does not do so, what is its effect? Whether a party has a right to withdraw and what is the effect of such withdrawal upon the Joint venture depends upon the terms of the agreement and/or upon the circumstances. Generally, no co-venturer has a right to withdraw from or abandon it without the consent of his co-venturers where the venture has not fulfilled its purpose. In absence of a decree of a Court or on an agreement fixing the time of termination or voluntary abandonment of the enterprise by one of the co-venturers, the joint venture agreement remains in force until its purpose is accomplished or becomes impossible for fulfilment and while it is in force, ordinarily, one joint venturer has no right to withdraw himself from the arrangement. It is only where the joint venture agreement is silent about this duration or termination, that a co-venturer has right to withdraw, since it is virtually a limited partnership at will.** Even the abandonment of a joint venture by one of the participants, and his active opposition to its operation by his co-venturers will not forfeit his interest in the enterprise or deprive him of his right to share in the profits (see: American Jurisprudence, second edition vol. 46, paragraph 50 at pp. 67, 68, 69).
>
> (emphasis supplied)

In **New Horizons Limited v Union of India**, the Supreme Court explained the concept of joint venture as under.

> The expression "joint venture" is more frequently used in the United States. It connotes a legal entity in the nature of a partnership engaged in the joint undertaking of a particular transaction for mutual profit or an association of persons or companies jointly undertaking some commercial enterprise wherein all contribute assets and share risks. It requires a community of interest in the performance of the subject-matter, a right to direct and govern the policy in connection therewith, and duty, which may be altered by agreement, to share both in profit and losses. (Black's Law Dictionary, 6th Edn., p.839) According to *Words and Phrases,* Permanent Edn., a joint venture is an association of two or more persons to carry out a single business enterprise for profit (p.117, Vol.23). A joint venture can take the form of a corporation wherein two or more persons or companies may join together. A joint venture corporation has been defined as a corporation which has joined with other individuals or corporations within the corporate framework in some specific undertaking commonly found in oil, chemicals,

electronic, atomic fields. (Black's Law Dictionary, 6th Edn., p.342) Joint venture companies are now being increasingly formed in relation to projects requiring inflow of foreign capital or technical expertise in the fast developing countries in East Asia, viz., Japan, South Korea, Taiwan, China etc. (See Jacques Buhard : Joint Ventures in East Asia – Legal Issues (1991).] there has been similar growth of joint ventures in our country wherein foreign companies join with Indian counterparts and contribute towards capital and technical know-how for the success of the venture.

A further reference, may be made to 'Words and Phrases' Permanent edition volume 23 as well as its 2002 Cumulative Annual Pocket Part). In page 230 of Volume 23, the following description of 'joint venture' is given.

To constitute a "joint venture" certain factors are essential: (a) each party to the venture must make a contribution, not necessarily of capital, but by way of services, skill, knowledge, material or money; (b) profits must be shared among the parties; (c) there must be a joint proprietary interest and right of mutual control over the subject matter of the enterprise; (d) usually, there is a single business transaction rather than a general or continuous transaction.

A "joint venture" is association of persons or corporations who by contract, express or implied, agree to engage in common enterprise for their mutual profit.

"Joint venture" is special combination of two or more persons, where, in some specific venture, profit is jointly sought without any actual partnership or corporate designation, or an association of persons to carry out a single business enterprise for profit for which purpose they combine their property, money, effects, skill and knowledge.

A "joint venture" is an undertaking by two or persons jointly to carry out a single business enterprise for profit; there must be community of interest in the enterprise, sharing of profits and losses, and some joint participation in conduct of the business.

A "joint venture" is an association of two or more persons to carry out a simple enterprise for profit; there must be a community of interest in the purpose for which the relation is established and an expectation of profit and the sharing thereof.

In page 237, "joint venture" is defined as under.

A "joint venture" or enterprise is in essence an informal partnership between two or more persons for a limited undertaking or purpose, and exists when two or more persons combine in a joint business enterprise for their mutual benefit, with express or implied understanding or agreement that they are to share in the profits or losses of the enterprise, and each is to have a voice in its control and management.

In page 94 of 2002 Annual Pocket Part of 'Words and Phrases' (permanent edition), joint venture is described as under:

> "joint venture" exists when parties have joined their property, interests, skills and risks, for purpose of particular adventure, their respective contributions have become as one and comingled property and interests of parties have thereby been made subject to each of the associates on the trust and inducement that each would act for their benefit.

On reading decision of Supreme Court and two judgments of Gujarat High Court, it may be summarised that an informal partnership between two or more persons to take up a common enterprise on one time basis is a 'joint venture'. The 'joint venture' involves the factors, like (i) contribution by the parties of money, effort, knowledge and other assets to common undertaking; (ii) joint property interests in the subject matter of the venture; (iii) right of mutual control of management of the enterprise; (iv) expectation of profit; (v) right to participate in the profits; and (vi) limitation of the objective to a single undertaking.

The second respondent issued tender notice No.2 dated 13.08.2004 inviting offers for pre-qualification to tender for water resource development projects. As per the general instructions to applicants in tender notice, it is essential that the bidder/firm/company should have annual turnover of Rs.50 crores at least for two financial years in a block period of preceding five financial years. That is to say, before 31st March, 2004, a bidder must be able to show the annual turnover of Rs.50 crores for two years during the period from 1999-2000 to 2003-2004. The instructions also provided that in case of the application from a joint venture, one partner of the joint venture should meet the requirement of annual turnover and all partners in JV should meet 25 per cent of the annual turnover as prescribed individually and all the joint venture partners should meet the criteria as prescribed in paragraph 1.0(f) individually. Be it noted, as per instructions in paragraph 1.0(f), the bidder/firm/company must have been making a net profit (before tax) for the last three years.

The GVPREL as an individual bidder was not having the annual turnover of Rs.50 crores for the financial year 2002-2003. They fell short of Rs.1,678.64 lakhs for that year taking into consideration annual turnover updated value of Rs.3,321.36 lakhs. It is for this reason, GVPREL entered into joint venture agreement with MEE on 31.08.2004. As seen from the preamble of JV agreement, GVPREL and MEE desirous of entering into a JV and submitting tenders for pre-qualification to tender for water resource development projects vide tender notice No.2 came together to form JV. As per clause 12 thereof, both JV partners agreed to enter into separate agreement for each and every work either to tender, accept, reject, execute or any understanding for and on behalf of JV. By reading JV agreement, it becomes clear that both the partners entered into JV agreement only for the purpose of offering for

pre-qualification to tender for water resource development projects. As noticed at the outset, the Government of Andhra Pradesh took up tender process in two stages. It is only in second stage that separate tender notices will be issued by the respondents where upon a bidder/firm/company including JV has to submit tenders. When the submission made by learned Senior counsel for the petitioner is considered, this aspect of the matter cannot be ignored. Going by the very agreement between GVPREL and MEE, it becomes clear that the said agreement holds good only till the time of submitting offers for pre-qualification to tender and in case the JV desires to tender, accept, reject, execute on behalf of JV, both the partners have to come to a separate agreement for each such work.

GVPREL and MEE executed letter authorizing Mr.G.S.S.Reddy to sign the pre-qualification document on behalf of JV and also undertook to be responsible for the tender document submitted by Mr.G.S.S.Reddy on behalf of JV. No objection was raised in the counter affidavit with regard to this aspect. The learned Advocate General while inviting attention of this Court to the JV agreement and the authorization letter, submits that though there was no separate agreement at the time of submitting tenders for various packages, the respondents proceeded on the basis of these two documents as if the JV was entitled to bid for the works based on the JV agreement. He, however, submits that, as noticed above – when MEE submitted letter on 21.02.2005 withdrawing from JV, the same became non-existent and therefore the decision of the respondents does not suffer from any illegality. For this purpose, he relied on the general instructions to the applicants in tender notice No.2, dated 13.08.2004, the JV agreement dated 31.08.2004 especially the preamble portion and clauses 12, 14 and 15 and clauses 2.3(v) and (ix) of tender schedule in support of the contention that when MEE withdrew from the JV, it became non-existent. It is necessary to read these clauses.

GENERAL INSTRUCTIONS TO APPLICANTS IN TENDER NOTICE NO.2, DATED 13.08.2004

1. The notice is issued to apply for consideration to be included in the panel of agencies to be short listed and prescribe the following qualification criteria.

b. Omitted

a. **Annual Turnover: The bidder/firm/company on his name should have achieved in at least two financial years a minimum annual financial turn over in all class of civil Engineering Works of value not less than Rs.50 crores in block period of preceding five financial years.**

b. Omitted.

c. Omitted.

d. Omitted.

e. **The bidder/firm/company must have been making a net profit (before tax) for the last three years.**

f. In case if the application is from a joint venture, it should satisfy

the following minimum criteria.

i. The No.of partners in the Joint Venture shall not be more than two.

(ii) One partner of the Joint Venture should meet the requirement as prescribed at para 1(b) and all partners should meet 25% of the annual turn over as prescribed at para 1(b) individually.

(iii) One partner of Joint Venture should meet similar work criteria as prescribed at para 1(c).

(iv) One partner of Joint Venture should meet net worth criteria as prescribed at para 1(e) and the other partners should meet at least 25% of the net worth as prescribed at para 1(e) individually.

(v) All the Joint Venture partners should have registered with Government of Andhra Pradesh with valid registration under special class, Civil terms of the aforesaid Gos and are only eligible for participation.

(vi) The Joint Venture partner of one bidder/firm/company shall not enter into Joint Venture partnership with another bidder/firm/company for the empanelment.

(vii) All the joint venture partners should meet the criteria as prescribed at para 1(f) individually.

(emphasis supplied)

Subsequently, a corrigendum was issued substituting 1(g)(ii) with the following:

1. (g)(ii) The Annual turnover of Joint Venture partners put together, at least in two financial years in a block period of preceding five years, should be Rs.50.00 crores and the partners other than the lead partner should meet 25% of the prescribed annual turn over of Rs.50.00 crores individually.

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JV AGREEMENT BETWEEN GVPREL AND MEE

Whereas the parties are desirous of entering into a joint venture and submitting the tenders for “PRE-QUALIFICATION TO TENDER FOR WATER RESOURCES DEVELOPMENT PROJECTS FOR MEDIUM SIZED PACKAGES”, vide Tender Notice No.2; dated:13/08/2004 of Government of A.P., Irrigation & CAD Department, Errumanzil, Hyderabad.
…

And whereas the parties hereto and desirous to form a Joint Venture and tender for and execute successfully the works connected with the following

tender notices of Irrigation & CAD Department, vide Tender Notice No.2; Dated 13/08/2004. Now, it is agreed to by between the parties as follows:

1. to 11. Omitted.

12. Both the Joint Venture firm shall have to come to an agreement for each and every work either to tender, accept, reject, execute or any understanding for on behalf of the Joint Venture without agreement, the transactions shall not hold any validity.

13. Omitted.

14. That the parties hereto shall subject to the terms and contractual obligations of the work orders, carryout and function under the Joint Venture to the greatest common advantage and shall be profits and losses in proportion to their investments and shall be just and faithful to each in tendering, accounts information and other matters affecting the Joint Venture.

15. Omitted.

16. Omitted.

It may also be noticed that under JV both the partners agreed to constitute a managing committee consisting of eminent technical and administrative personnel and appoint a project manager to fulfil all contractual obligations of JV and also agreed that the partners shall carry out the contractual obligations either jointly or by distributing the works among themselves but always remaining jointly and severally liable for execution of JV works. As per the JV agreement, the main purpose and object of JV is to take up major works in relation to the notice inviting offers for pre-qualification to tenders.

INSTRUCTIONS TO BIDDERS IN TENDER SCHEDULE

2.3 Bidder who submits the bid having tie-up with reputed agencies/firms for the specialized work of conducting surveys and detailed investigation of canal system and design-engineering of the total canal system and design, fabrication and erection of gates shall comply with the following requirements.

(i) to (iii) omitted.

(iv) The bidder shall be the lead partner of the Joint venture. In case of successful Bid on award of work jointly authorized representative shall sign the contract.

(v) The change of MOU/Joint Venture partner shall not be accepted under normal conditions after submitting the Bid documents. However, the change in joint venture/MOU partner may be considered in the event of insolvency, death, stoppage of business, abstaining from country for longer period and participation in terms of people's representation Act of India etc, only with the prior approval of the employer. The employer reserves the right to reject such requests/proposals from any joint venture/MOU partner if it adversely

affects the Joint venture/MOU strength.

(vi) to (viii) omitted.

(ix) All partners of MOU/Joint Venture shall be liable joint and severally responsible for the execution of contract in accordance with contract terms and a relevant statement to this effect shall be included in the MOU/Joint Venture partnership deed.

(x) and (xi) omitted.

(emphasis supplied)

A plain reading of the above clauses in the relevant documents and in the background of the legal principles, compel this Court not to countenance the submission of the learned Senior counsel, Sri E.Manohar, that even after withdrawal of MEE by reason of the GPA/authorization letter, Mr.G.S.S.Reddy continued to represent JV, and that the JV as such was not wound up or dissolved, cannot be accepted for reasons more than one. First, even according to JV agreement at the stage of award of contract by the employer, JV partners have to discharge certain legal obligations. Both the partners have to enter into an agreement, they have to constitute a managing committee and appoint a project manager. They have to contribute funds and continue to have community of interest in undertaking the works, in sharing the profits and being responsible to third parties. Though GVPREL by reason of JV may take upon themselves these obligations as an individual entity, after the withdrawal of MEE from the JV, the other partner of JV cannot be said to have taken upon themselves the legal obligations under JV agreement. Whether MEE can withdraw from JV agreement and whether such withdrawal is binding on the employer is altogether different dispute between two JV partners. But insofar as employer is concerned, at the time of issue of LoA it is very relevant when the same is considered in the background of the tender conditions at the stage of pre-qualification as well as financial bid. When once MEE withdrew from JV agreement, it would not be possible for GVPREL and MEE to jointly and severally own the legal obligations in relation to third parties.

Secondly, as per admitted case of GVPREL represented by Mr.G.S.S.Reddy, they have taken MEE as a partner in the JV as GVPREL fell short of Rs.1,678-64 lakhs for the financial year 2002-2003 so as to satisfy clause 1(b) of General Instructions to applicants in the tender notice inviting offers for pre-qualification to tenders. If MEE is left out by reason of their withdrawal, the alleged JV would not be able to satisfy the essential requirement/qualification of having annual turnover in two financial years of Rs.50 crores or Rs.500 lakhs in a block period of preceding five financial years. The position, therefore, would be, awarding of contract to a JV minus its another partner, which does not satisfy the essential qualification of having the annual turnover of Rs.500 crores in two years. This is an important aspect which belies the submission of the learned Senior counsel for the petitioner. What would be the position if – assuming – MEE had withdrawn from JV after the award of the contract or after commencing the works as per the contract? Leaving the dispute between two JV partners to be decided by appropriate legal forum, it is a choice left to the employer either to compel the JV represented by the lone remaining partner or

permit the change of MOU/joint venture. Such an eventuality is taken care of by clause 2.3(v) of the General Instructions to bidders contained in tender schedules. Even under the said clause, the right is reserved to employer to reject the proposal from any JV for change of MOU/JV partner if it adversely affects JV strength. In this case, precisely that is what happened, the moment MEE withdrew from JV by giving a letter on 21.02.2005, the strength of other partner, GVPREL, was not what it was when JV offered for pre-qualification by reason of JV on 31.08.2004. Indeed GVPREL was not even qualified to offer for pre-qualification to tender as admittedly do not have annual turnover of Rs.500 lakhs in two financial years in the block period of five years prior to 31.03.2004. Therefore, this submission of the learned counsel that even after the withdrawal of MEE, JV continued to exist cannot be accepted. It must be remembered that the company incorporated in the nature of joint venture may not lose its juristic personality. Similarly a registered partnership firm under Partnership Act may still have certain obligations, rights and liabilities, even after dissolution, by reason of Sections 45, 46 and 47 of Partnership Act, 1932. The same is not position, in the case of a JV which came into existence by reason of agreement between two or more JV partners. When there are only two partners in the JV, and one of them goes out, it is very difficult to accept such entity as a continuing JV especially when it only draws its sustenance under a mutual agreement between the two partners.

The above position can be better appreciated by two illustrations. If there is a bicycle with two wheels and if one wheel is lost, by no stretch of common sense the remaining part can be called a bicycle as it ceased to be a bicycle the moment one wheel is lost. The same may also be the case in the case of four-wheeler with only four wheels. But in the case of motor vehicle with six wheels or more number of wheels in the rear or in the front or in the middle (such vehicles are now common), even if one wheel or one tyre of one wheel is lost, still the vehicle can run. The decision of the Gujarat High Court in **Chahal Engg. & Construction Co(P) Ltd. v. State of Gujarat** (supra) precisely deals with such a situation. In this case the petitioners with six other companies including one M/s.Mahaling A Shetty Limited entered into a joint venture consortium by agreement dated 20.07.1983, known as Torno for Narmada, for executing a project of concrete adam across Narmada river for Sardar Sarovar Project with 17%, 23%, 24%, 2%, 17%, 8% and 1% respectively as shares in the profits and losses of the works. The said JV offered to pre-qualify to tender pursuant to notice. The State of Gujarat refused to pre-qualify 'Torno for Narmada' on the ground that one of the co-venturers to the original JV agreement, M/s.Mahaling A Shetty Limited had not joined the execution of a postil though other co-venturers executed the same. The submission was therefore made that as long as the original agreement is enforced, the withdrawal of one of the JV partners would not result in dissolution of JV consortium. The Division Bench of Gujarat High Court noticed that the non-execution of the postil by M/s.Mahaling A Shetty Limited would not in any manner affect the JV consortium as the other participants continued JV. Indeed clause 3 of JV agreement therein provided that in the event of withdrawal of a party, it shall reduce the participation of the JV to the extent of withdrawing party and would not prejudice JV in the attainment of its aim. For this reason, the Gujarat High Court allowed the writ petition quashing the impugned decision of rejection to

pre-qualify.

In the present case, the JV agreement is silent as to *inter se* rights of the JV partners in the event of withdrawal of one of them. The agreement is also silent as to how long the venture would continue. Indeed, if one reads clause 15 and the preamble portion, the agreement shall be confined and applied to the matters concerning works with the works of tender notice No.2 dated 13.08.2004. In one way, the moment offers for pre-qualification submitted by the petitioner JV, it became non-existent. Therefore, the submission of the learned Senior counsel for the petitioner that the petitioner JV must be deemed to be continued till the actual works are executed by the petitioner, having regard to the submission of bank guarantees by GVPREL, authorization being in favour of Mr.G.S.S.Reddy and GVPREL being a lead partner, cannot be accepted. Even otherwise the moment MEE gave letter withdrawing from JV, it became non-existent.

The issue may be looked at from different angle as well. What would have been the position if MEE had withdrawn before empanelment of the petitioner JV? What would have been the status of petitioner JV vis-à-vis the employer if MEE had withdrawn after award of work to petitioner JV by the Government? If MEE had withdrawn even before pre-qualification of petitioner JV to tender, admittedly GVPREL was not eligible by reason of not having required annual turnover and therefore would have suffered disqualification. If MEE had withdrawn from JV after award of contract, two things would have been possible. First, as per instruction 2.3(v) of tender schedule, the Government may have agreed for the change of MOU/JV and allowed the petitioner JV to continue the contract. Second option was that the employer could have refused the change of MOU/JV and compelled the remaining JV partner to complete the work accepting the liability. As the things stand the respondents rejected the tender of the petitioner on the ground that petitioner JV is not existent due to withdrawal of MEE. This situation is no different from the first situation. Indeed as noticed above in their letter dated 05.05.2005, the petitioner JV represented by Mr.G.S.S.Reddy admits that without the participation of MEE as the partner either petitioner JV or GVPREL would not have been qualified to offer for pre-qualification. In that view of the matter, the decision of the respondent cannot be held illegal.

There is yet another reason also. On 21.02.2005 MEE addressed the second respondent informing that they are no longer interested in continuing as a partner in JV with GVPREL and that they are withdrawing from the JV. A reference was also made to clause 12 of JV agreement, which stipulates that any transaction made by JV without coming to an agreement with MEE shall not hold any validity. Purporting to invoke clause 12 of JV agreement, MEE requested for cancellation of the bids and not to consider the bids submitted by petitioner JV. A reading of the letter of MEE would show that the effect of withdrawal from JV is disclaimer and claim of discharge from all liabilities flowing under JV agreement. Indeed, *prima facie,* JV agreement dated 31.08.2004 supports their view that there cannot be any acceptance of the work/tender submitted by the petitioner JV without there being any

other agreement. In such a situation assuming that the Government proceeds with award of contract to the petitioner JV and ultimately if something goes wrong in the execution, the Government would not be entitled to proceed against MEE. The Government might entangle itself in litigation and in such a case the Government was justified in rejecting the tender submitted by the petitioner JV on the ground that JV is not existent.

Further a reading of the letter addressed by Mr.G.S.S.Reddy on 05.05.2005 would show that GVPREL as a lead partner claimed the award of work to it as GVPREL and not as petitioner JV. It is therefore possible to draw an inference that even Mr.G.S.S.Reddy, the GPA holder of petitioner JV was also aware of the position and that is the reason why he requested second respondent to issue LoA for the three packages. The offer for pre-qualification to tender made by the petitioner JV and the commercial bid made by GVPREL are produced before this Court. A perusal of these would show that surprisingly the commercial bid was not made by Mr.G.S.S.Reddy as authorized signatory of petitioner JV but the commercial bid was made on behalf of GVPR Engineers Limited. This would also strengthen the view taken by this Court.

For all the above reasons, though the petitioner is admittedly has a status of L1 in respect of packages 90, 91 and 98 as it became non-existent, the mandamus as prayed directing the respondents to issue LoA for packages 90, 91 and 98 cannot be issued. If the petitioner is excluded from the competition, the position would be that in respect of package No.90, there is a difference of Rs.8,48,00,000/- between L1 and L2 and Rs.62,23,00,000/- between L1 and L3. Likewise, in respect of package No.91, difference would be Rs.7,20,00,000/- between L1 and L2 and Rs.15,15,00,000/- between L1 and L3, where as in respect of package No.98, the difference between L1 and L2 would be Rs.2,09,99,997/- and the difference between L1 and L3 would be Rs.3,17,00,097/-. If the work for all the three packages is now allotted to L2, the total difference would be Rs.17,77,99,997/- which by any standards huge difference. In such circumstances, to safeguard and subserve public interest, it would be better if for three packages - 90, 91 and 98, Government issues fresh tenders. It is also brought to the notice of this Court though tenders were invited for various packages under water resources development project, so far no tender is finalised and even if tenders are finalised for some packages, the work is yet to be commenced. Therefore, there would be any prejudice to the public interest by reason of delay if any in the commencement of the project work.

In the result, while directing the respondents to call for fresh tenders for packages 90, 91 and 98, and declaring that the petitioner is not entitled to any relief as prayed, the writ petition is disposed of without any order as to costs.

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(V.V.S.RAO,J)

15.07.2005.

pln

Note: LR copy be marked.

(By order)

pln

To

One Fair Copy to the Honourable Sri Justice V.V.S.Rao

(For his Lordships Kind Perusal)

1 The Principal Secretary, Government of Andhra Pradesh,
Irrigation and Command Area Development Department,
Scretariat, Hyderabad.

2 The Engineer-in- Chief (Irrigation), Irrigation & Command Area
Development Department, Errum Manzil, Hyderabad.

3 Two CCs to the Adovcate General/GP for Irrigation & Command
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